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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Calaveras)

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DON H. LEE,

Plaintiff and Appellant,

v.

FINANCIAL PACIFIC INSURANCE COMPANY,

Defendant and Respondent.

C067418

(Super. Ct. No.  
10CV36902)

Defendant Financial Pacific Insurance Company (Financial Pacific) filed an anti-SLAPP motion, pursuant to Code of Civil Procedure section 425.16,<sup>1</sup> to strike plaintiff Don H. Lee's complaint.<sup>2</sup> The trial court granted the motion, finding that the

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<sup>1</sup> Hereafter, unspecified code references are to the Code of Civil Procedure.

<sup>2</sup> "SLAPP" means Strategic Lawsuit Against Public Participation.

complaint arose from Financial Pacific's protected petitioning activity and Lee did not have a probability of prevailing on the merits.

We affirm.

#### ANTI-SLAPP LAW

Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." "As used in [section 425.16], 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law . . . ." (§ 425.16, subd. (e).)

"Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a

public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

We review an order granting an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) "'We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]" [Citation.]" (*Flatley v. Mauro, supra*, at p. 326.)

#### BACKGROUND

Westwind Development, Inc. (Westwind) developed the subdivision called Gold Strike Heights in Calaveras County. Financial Pacific Insurance Company, the defendant in the current action, issued bonds guaranteeing to the Gold Strike Heights Association, representing the homeowners, that Westwind would perform its obligations.

There are three actions that are relevant to this appeal:

- The first was an action by Gold Strike Heights Association (the rights to which Gold Strike Heights Association assigned to Don H. Lee, the plaintiff in the current action) to recover from Financial Pacific on a bond guaranteeing Westwind's payment of homeowners association dues to Gold Strike Heights Association. We refer to this action as the "dues action."
- The second was an action by Gold Strike Heights *Homeowners* Association (note the difference from Gold Strike Heights Association) to recover from Financial Pacific on a bond guaranteeing Westwind's construction of a clubhouse. We refer to this action as the "clubhouse action."
- The third and final (the current action on appeal) is an action by Lee seeking declaratory relief concerning the validity of the settlement in the dues action. We refer to this action as the "declaratory relief action."

In 2008, Financial Pacific settled the dues action with Lee for the amount of the bond (\$23,070), sending the check to the Gold Strike Heights *Homeowners* Association (not the Gold Strike Heights Association, which corporation had been suspended and, according to Lee, succeeded by the Gold Strike Heights Homeowners Association). At the time, Financial Pacific was represented by Edward Rocknich.

In 2010, the clubhouse action went to trial. In preparing for that trial, Janis Hulse, the new attorney for Financial Pacific, discovered that the settlement proceeds in the dues

action had been paid to the Gold Strike Heights Homeowners Association, which was not the beneficiary named on the bond. Despite the payment to an association not named as beneficiary on the bond, Financial Pacific was fully reimbursed by a principal of Westwind for the settlement in the dues action.

In a motion in limine in the clubhouse action, Hulse, on behalf of Financial Pacific, sought to exclude from the trial any evidence of the settlement paid in the dues action. In the course of arguing the motion in limine, Hulse made the following statement, which is the core of Lee's declaratory relief action:

"If this [the settlement in the dues action] is going to come into evidence, we will put people on that we feel that [Financial Pacific] was defrauded in that Mr. Lee represented he was the homeowners association on the bond. I was the person who discovered part way into this litigation that, oh, my gosh, these aren't even the proper obligees, that -- that the proper obligee is a suspended corporation, and Mr. Lee . . . created a whole new corporation in 2007. That was before -- that information that I discovered was after [Financial Pacific] paid on the bond and realized they had been defrauded. . . . So you're creating a whole new trial on a whole new issue that is not relevant to this case as to a mistake [Financial Pacific] may have made or a fraud committed by Mr. Lee."

The trial court in the clubhouse action excluded, under Evidence Code section 352, the evidence concerning payment of the settlement in the dues action.

Lee demanded a retraction of Hulse's statements concerning the possible mistake or fraud involved in paying the settlement in the dues action. But neither Hulse nor Financial Pacific responded to the demand. Thereafter, Lee filed his complaint for declaratory relief, seeking a declaration that the dues action settlement was valid and for costs and attorney fees under Civil Code section 1354, subdivision (c), which provides for an award of costs and attorney fees in an action to enforce equitable servitudes.

In his complaint for declaratory relief, Lee characterized the dispute as follows:

"Defendant Financial Pacific now contends that the rightful beneficiary under the surety bond was the Gold Strike Heights Association, not the Gold Strike Heights Homeowners Association and thus payment to this later enacted corporation was in error and procured by fraud and the \$23,070.00 must be returned. [¶] Plaintiff Lee however contends that the intended beneficiary of the surety bond was the Gold Strike Heights Homeowners Association as the successor corporation to the Gold Strike Heights Association and the payment was entirely appropriate. [¶] Plaintiff Lee further contends that no fraud whatsoever was committed by Plaintiff Lee when Defendant Financial Pacific offered to settle the 2007 case and further insisted that the \$23,070.00 settlement proceeds be paid directly to the Gold Strike Heights Homeowners Association." (Unnecessary capitalization and paragraph numbers omitted.)

Later in the complaint, Lee added: "Plaintiff Lee mailed letters to attorney Janis Hulse advising her that he would have no other choice but to file an action for declaratory relief unless Defendant Financial Pacific withdrew its claim that the 2008 release agreement was procured by fraud. There was no response whatsoever to either communication."

Finally, Lee stated that he believed that Financial Pacific intended to recover the settlement proceeds from Lee.

Financial Pacific filed a motion to strike based on section 425.16. In support of the anti-SLAPP motion, Hulse declared that Financial Pacific does not currently plan to seek rescission of the dues action settlement because Financial Pacific was fully reimbursed for the money it paid to settle the action.

The trial court granted Financial Pacific's anti-SLAPP motion. It concluded that (1) the declaratory relief action was based solely on Hulse's comments in the clubhouse action, which constituted protected petitioning activity, and (2) Lee made no showing of a probability of prevailing on the merits. The trial court therefore entered judgment in favor of Financial Pacific.

Lee appeals, representing himself.

#### DISCUSSION

##### I

##### *Arising from Protected Activity*

We first turn to the question of whether the trial court properly found that Lee's complaint arose from a protected

activity. We conclude that his complaint arose solely from Hulse's protected petitioning activity in the clubhouse action.

In determining whether the challenged action is one arising from a protected activity, the "court must . . . focus on the substance of the plaintiff's lawsuit" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 669-670) and determine "whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech [citations]" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*), original italics.) "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92, original italics.)

"Where . . . a cause of action is based on both protected activity and unprotected activity, it is subject to section 425.16 "unless the protected conduct is 'merely incidental' to the unprotected conduct."" [Citations.]" (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551.)

The dispute Lee seeks to resolve in his declaratory relief action is whether the settlement in the dues action remains valid. Lee's action is based completely on Hulse's statements in her argument concerning the motion in limine in the clubhouse action. Without those statements, there is no dispute.

Financial Pacific has made no statements in derogation of the settlement (except for Hulse's statements), and Financial Pacific has taken no action or threatened any action to undo the settlement.

Lee's complaint with regard to Financial Pacific's position and intention is simply unfounded. He alleges in his complaint that Financial Pacific intends to recover the settlement funds paid in the dues action, but the facts presented in the anti-SLAPP motion do not support that allegation. That leaves as the core of Lee's action his allegation that he filed the declaratory relief action because Hulse's failure to retract the statements gave him "no other choice . . . ." In other words, the complaint is based on Hulse's statements, not some underlying dispute.

Section 425.16 protects any "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.'" (§ 425.16, subd. (e).) Such acts include "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . . ." (§ 425.16, subd. (e).) Thus, "statements, writings and pleadings in connection with civil litigation are covered by the anti-SLAPP statute, and that statute does not require any showing that the litigated matter concerns a matter of public interest. [Citations.]" (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35.)

Here, Hulse's statements were made in connection with civil litigation and are therefore protected petitioning activity under section 425.16.

While conceding that Hulse's statements were made in connection with a civil proceeding, Lee contends that his action does not arise from those statements but, instead, those statements are merely evidence of an underlying dispute. In support of this contention in his opening brief, Lee cites several cases, including *State Farm General Ins. Co. v. Majorino* (2002) 99 Cal.App.4th 974 (*Majorino*), which he also cites in his reply brief.

In *Majorino*, several individuals filed a complaint against homeowners after the individuals were allegedly assaulted during a party in the home. Thereafter, the homeowners' insurer, State Farm, filed an action against the partygoers and the homeowners seeking a judicial determination of State Farm's duty to indemnify the homeowners. The partygoers filed an anti-SLAPP motion in the declaratory relief action, but the trial court denied it. (*Id.* at p. 976.)

The Court of Appeal affirmed the denial of the anti-SLAPP motion. Responding to the partygoers' argument that State Farm's action arose from their filing of the original complaint, the court stated: "[T]he act that underlies and forms the basis for State Farm's declaratory relief action is not the personal injury lawsuit filed by [the partygoers], but the [homeowners'] tender of the defense of that lawsuit under a policy that contains an arguably applicable exclusionary clause."

(*Majorino, supra*, 99 Cal.App.4th at p. 977.) In other words, State Farm's declaratory relief action pertained to a real dispute concerning terms of the insurance policy. State Farm sought a declaration that the insurance policy did not apply to the alleged loss and, therefore, State Farm was not liable.

Here, there is no such real, underlying dispute. Considering the evidence submitted in connection with the anti-SLAPP motion, as we must, we conclude that Financial Pacific is not attempting to invalidate the settlement in the dues action. And, since there is no underlying dispute, Lee's complaint arose solely from Hulse's in-court statements.

Accordingly, Financial Pacific established that Lee's complaint arose from a protected activity, and we must determine whether Lee established a probability of prevailing on the merits.<sup>3</sup>

## II

### *Probability of Prevailing on the Merits*

The trial court found that Lee did not establish a probability of prevailing on the merits. We agree.

To establish a probability of prevailing on the merits, a plaintiff opposing an anti-SLAPP motion must ""state[] and substantiate[] a legally sufficient claim."" [Citations.] Put

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<sup>3</sup> In his opening brief, Lee notes, with separate headings but without cited authority, that his only cause of action was for declaratory relief and the only named defendant was Financial Pacific. In his reply brief, Lee disclaims any argument that those circumstances, alone, require reversal. He argues only that they are "important factors" to consider.

another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.' [Citation.] Thus, [a plaintiff's] burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment. [Citation.]" (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 768, italics omitted.)

Lee cites only one authority in his argument that he established a probability of prevailing on the merits: *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870 (superseded by statute on another issue as stated in *Lee v. Fidelity National Title Ins. Co.* (2010) 188 Cal.App.4th 583), which he claims holds that the litigation privilege does not bar use of a judicial communication to prove liability.

We need not delve into whether a judicial communication may be used to prove liability in this case because Lee has no probability of prevailing on the merits for a more fundamental reason: there is no actual controversy. Financial Pacific has

been reimbursed for the money it paid to Gold Strike Heights Homeowners Association in the dues action, and there is no evidence that Financial Pacific will ever attempt to invalidate the settlement. Contrary to Lee's allegation in his complaint, there is no evidence that "Financial Pacific intends to recover the \$23,070.00 paid to the Gold Strike Heights Homeowners Association . . . ." Therefore, a declaration concerning the validity of the settlement would have no effect.

"Any person interested under a written instrument . . . may, *in cases of actual controversy* relating to the legal rights and duties of the respective parties, bring an original action . . . for a declaration of his or her rights and duties in the premises . . . ." (§ 1060, italics added; see also *Pittenger v. Home Savings & Loan Assn.* (1958) 166 Cal.App.2d 32, 36.) Because there is no actual controversy here, Lee cannot obtain declaratory relief. Therefore, he has no probability of prevailing on the merits.<sup>4</sup>

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<sup>4</sup> Because we conclude that there is no actual controversy, we need not consider whether the dues action settlement was the product of fraud or mistake. We note, however, that, in order to establish a probability of prevailing on the merits, Lee would have to make the showing that the dues action settlement was not the product of fraud or mistake, which showing he does not even attempt on appeal. We also need not consider Financial Pacific's assertion that Lee has no standing to assert the validity of the dues action settlement.

DISPOSITION

The judgment is affirmed. Financial Pacific is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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NICHOLSON, J.

We concur:

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RAYE, P. J.

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MAURO, J.